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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

Before The Honorable William H. Alsup, Judge

FLUIDIGM CORPORATION, a )  
Delaware corporation; and )  
FLUIDIGM CANADA INC., a foreign )  
corporation, )  
 )  
Plaintiffs, )  
 )  
VS. ) NO. C 19-5639  
 )  
IONPATH, INC., a Delaware )  
corporation, )  
 )  
Defendant. )  
\_\_\_\_\_ )

San Francisco, California  
Thursday, January 23, 2020

**TRANSCRIPT OF PROCEEDINGS**

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Official Reporter, CSR No. 12219

(APPEARANCES CONTINUED ON FOLLOWING PAGE)

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Thursday - January 23, 2020

9:03 a.m.

P R O C E E D I N G S

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**THE CLERK:** Calling Civil Action 19-5639. Fluidigm Corporation, et al., versus IONpath, Incorporated.

Would counsel step forward and state your appearances for the record.

**MR. MARSHALL:** Lee Marshall and Abigail Gordon for Fluidigm Corporation.

**MS. MEHTA:** Good morning, Your Honor.

Sonal Mehta, Taylor Gooch, and Josh Furman on behalf of IONpath. And we have the CEO and co-founder of IONpath, Dr. Harris Feinberg, here as well.

**THE COURT:** Where is he?

**MS. MEHTA:** He is right back there.

**AUDIENCE:** I'm here, Your Honor.

**THE COURT:** Welcome to the court.

All right. I can't go through every single argument you have made. It's just too much. So tell me the most important point you want me to have in mind.

**MS. MEHTA:** Yes, Your Honor. I have three points, but I'll start with one, and then we'll see --

**THE COURT:** You only get one.

**MS. MEHTA:** Okay.

**THE COURT:** Maybe I will give you two, if you're good.

1           **MS. MEHTA:** Okay. Thank you, your Honor.

2           **THE COURT:** I can't handle three. I got a -- I got  
3 briefs.

4           **MS. MEHTA:** I understand, Your Honor.

5           **THE COURT:** Okay. Tell me the most -- the thing that  
6 in your experience the poor judge is likely to overlook, and  
7 you want to make sure that I'm up-to-speed on.

8           All right. I want to hear it.

9           **MS. MEHTA:** Yes, Your Honor. The key point I would  
10 ask Your Honor to consider is the intentional interference with  
11 contract claim and the fundamental failure to allege two  
12 critical elements of that, which are specific contracts and any  
13 breach of the contract themselves.

14           In paragraphs 90 to 96 of the pleading, where they  
15 actually lay out their claim for intentional interference of  
16 contract, there is a lot of suggestions about supposed or  
17 alleged encouragement of breach, but there is no contract  
18 actually identified, and there is no allegation of any breach.

19           And even in the briefing, even in their opposition to a  
20 motion to dismiss, they have not been able to identify any  
21 specific contract or any breach.

22           The best they have been able to come up with is the  
23 suggestion that they have these terms and conditions with this  
24 category of entities, which include governments, academic  
25 institutions, and other private entities -- which means anybody

1 in the world, in a category of contracts with any possible  
2 customer. And then no allegation that there has actually been  
3 any breach of any of those terms and conditions as to any of  
4 those potential customers, let alone any act by IONpath that  
5 caused the breach.

6 That fundamental failing means there is no breach of  
7 contract and there is no intentional interference.

8 **THE COURT:** All right. You said that very succinctly.  
9 I'm giving you an A-plus.

10 **MS. MEHTA:** Thank you, Your Honor.

11 **THE COURT:** I understand your argument completely.  
12 And unlike many lawyers, you avoided blather; you got right to  
13 the point. That was excellent. Well done.

14 All right. I just want to -- on this one point, I'm on  
15 a -- right now, I'm this close to granting this motion, so you  
16 need to explain to me why, Counsel -- no blather. Come right  
17 to the point. She says you never identified the contract, you  
18 never identified the breach, and now you're trying to blame  
19 them. Go ahead.

20 **MR. MARSHALL:** On paragraph 69, we identified the  
21 contract. It is the sales and license terms and conditions.

22 Paragraph 70, we identify the specific provision of the  
23 contract that we allege was breached and that they induced the  
24 breach of. It is the provision that Fluidigm's customers  
25 agreed not to, quote, use --

1           **THE COURT:** I'm sorry. Let me get the Complaint here.  
2 My law clerks never give me the Complaint -- or, I'm wrong.  
3 This time they did.

4 All right. What is the --

5           **MR. MARSHALL:** I'm on paragraph 69 and 70. This is  
6 page 19 of the Complaint.

7           **THE COURT:** Okay, 69. Paragraph 69. I'm going to  
8 read it myself. (reading):

9 "On or about February 7, 2018, Fluidigm" --

10 How do you say that name?

11           **MR. MARSHALL:** Fluidigm.

12           **THE COURT:** (reading):

13 "Fluidigm put IONpath on notice that by inducing and  
14 seeking to convince customers to use the Maxpar antibodies  
15 and related reagents with IONPath's technology, IONpath  
16 was causing customers to breach the sales and license  
17 terms and conditions, T and Cs, each customer agreed to  
18 when using Fluid"--

19 That doesn't identify any specific contract. Why didn't  
20 you say something like, "The sales and license agreement we had  
21 with the XYZ hospital in Omaha, Nebraska, dated XYZ?"

22 Why didn't you say that?

23           **MR. MARSHALL:** Well, Your Honor, we don't know all of  
24 their customers, but we do allege a specific customer and a  
25 specific breach that we do know of, and that's down in

1 paragraph 73 where we say that the cell paper that's referred  
2 to in paragraph 72 admits that IONpath knew that it and its  
3 founders, who were at Stanford University -- and that's  
4 described back on paragraph 64 -- breached the Ts and Cs.

5 It also --

6 **THE COURT:** I'm sorry, my paragraph 73 doesn't say  
7 that. What paragraph did you mention again?

8 **MR. MARSHALL:** 73, (reading):

9 "Not only did the paper admit that IONpath knew that  
10 it and its founders" --

11 Its founders are referenced earlier in the Complaint as  
12 Dr. Bendall and Dr. Nolan, both of whom are described as being  
13 at Stanford University -- that they breached the Ts and Cs.

14 So what's happening is that IONpath has an instrument  
15 called the MIBIScope. Fluidigm also has an instrument. And  
16 what IONpath is doing is directing their -- the people who own  
17 a MIBIScope, an IONpath instrument, to go buy Fluidigm's  
18 reagents and use it on their instrument.

19 And that's an express breach of Section 3.2 of the Ts and  
20 Cs, which were described in paragraph 70. And we put them on  
21 notice of that issue.

22 The notice is described in paragraph 69, so they knew of  
23 the Complaint. They knew of the specific provision of the  
24 Complaint that we believe that they were inducing customers to  
25 breach --

1           **THE COURT:** All right.

2           **MR. MARSHALL:** -- and then --

3           **THE COURT:** Wait. What do you say to that?

4           **MS. MEHTA:** Yes, Your Honor. I have two responses.

5           **THE COURT:** Just give me one. Just one at a time.

6           **MS. MEHTA:** The first is that the allegation in  
7 paragraph 73 is not -- even if you accept everything he is  
8 saying, is not an allegation that IONpath, which is the company  
9 that is the defendant in this case, induced anyone to breach  
10 any particular contract.

11           At best, it's an allegation that two professors at  
12 Stanford, who also happen to be co-founders of IONpath, are  
13 alleged to have breached a contract.

14           There is no suggestion of any activity by IONpath that  
15 would induce that breach, even if you accept what he's saying.

16           The second point, if you'll permit me, is that when you  
17 look at the actual allegations with respect to the breach of  
18 contract claim, in paragraphs 90 through 96, the allegations  
19 are not by the alleged breach by the Stanford professors in an  
20 academic paper.

21           What they are alleging is that there is encouragement of  
22 their customers to use their reagents with our instrument, and  
23 there is simply no allegation whatsoever that any customer has  
24 breached any agreement in doing so, let alone that we have  
25 encouraged that.



1           So even at best, they don't plead any inducement of a  
2       breach.

3           **THE COURT:** All right. Let me say it in my own words.  
4       Then I want plaintiff to explain this.

5           Yes, it's apparently true that these two doctors, Bendall  
6       and Angelo, wrote a paper in which it can be characterized as  
7       encouraging customers, your customers, to use their fluids with  
8       the -- your product. And let's assume for the sake of argument  
9       that that would, in fact, be a violation of the Ts and Cs. But  
10      what she says is that you don't allege a single customer who  
11      has actually done that.

12          **MR. MARSHALL:** We do allege a customer that's done  
13      that, and that is Stanford University --

14          **THE COURT:** Where is that? I don't see that.

15          **MR. MARSHALL:** Dr. Bendall and Angelo at Stanford  
16      University. That's referred to earlier in paragraph 64, the  
17      prior page, and they admit in that paper that they used the  
18      Fluidigm Maxpar X8 Antibody Labeling Kit as a critical  
19      commercial assay for use with IONPath's technology.

20          That's the specific breach that we are alleging of  
21      Section 3.2 of the terms and conditions.

22          **THE COURT:** So, then, what contract -- where does it  
23      say they violated some --

24          **MR. MARSHALL:** In the very next paragraph where it  
25      says, "its founders breached the Ts and Cs."

1           **THE COURT:** Right. I see your point.

2           **MR. MARSHALL:** And --

3           **THE COURT:** Wait, wait, wait. What do you say to  
4 that? So apparently, Bendall and Angelo signed off on the Ts  
5 and Cs, and they wrote a paper saying they violated it.

6           What do you say to that?

7           **MS. MEHTA:** First of all, there is no allegation of  
8 breach by them.

9           But second of all --

10          **THE COURT:** There is. It says -- I do see that.  
11 Paragraph 72, they wrote the paper, blah-blah-blah-blah, in  
12 violation of the Ts and Cs.

13          **MS. MEHTA:** You're right, Your Honor. I apologize for  
14 that. There is no claim of breach of contract against them.

15          More importantly, there is no allegation here, or anywhere  
16 in the Complaint, that IONpath, the defendant, did anything to  
17 induce any breach by anyone.

18          The fact that two academics at Stanford wrote a scientific  
19 paper about an experiment they ran in their lab, and that those  
20 two people happen to be associated with IONpath is not enough  
21 to create any kind of plausible inference that the company was  
22 encouraging any kind of breach.

23          **THE COURT:** All right. Maybe that's true. But aren't  
24 Bendall and Angelo the founders of IONpath?

25          **MS. MEHTA:** They are cofounders of the company, and

1 they have varying degrees of --

2 THE COURT: When did IONpath get formed?

3 MS. MEHTA: IONpath was formed 2018.

4 THE COURT: What month?

5 MS. MEHTA: Oh, no, I'm sorry, 2014. September of  
6 2014.

7 THE COURT: Oh, at the time IONpath -- they came on  
8 board in 2014, and this paper was submitted in 2018.

9 MS. MEHTA: Right.

10 THE COURT: So --

11 MS. MEHTA: But --

12 THE COURT: -- can't we infer from that that they did  
13 this on behalf of IONpath?

14 MS. MEHTA: No, Your Honor, you can't. And the reason  
15 for that is, one, although these people have some consulting  
16 role with IONpath, they also are academics that have a  
17 professor position at Stanford and have researched well outside  
18 of the scope of what they had to do with IONpath. And there is  
19 no allegation that what they were doing was on behalf of  
20 IONpath or at the direction of IONpath.

21 And more fundamentally, the allegation of inducement here  
22 is based on the paper itself. How can the paper induce -- the  
23 cell paper that is the subject of paragraph 72, be inducing  
24 customers to breach when the breach that they are alleging is  
25 the paper itself? It's a completely circular argument.

1           **THE COURT:** Oh, the paper is alleged to have admitted  
2 using Fluidigm's antibody labeling kit with IONpath -- I'm  
3 sorry, with -- using the two products together.

4           **MS. MEHTA:** That's not inducement of breach of a  
5 contract by a customer. In other words, they are arguing here,  
6 if you take Mr. Marshall's explanation at its face, what they  
7 are arguing is that these two scientific researchers breached a  
8 contract.

9           They are also arguing that the paper in which they say  
10 they breached the contract is inducement of a breach of  
11 contract by someone else. In other words, Dr. Bendall and  
12 Dr. Angelo can't be inducing themselves, let alone, is that  
13 evidence that IONpath is doing the inducement.

14           And that's the problem, is that all of this together  
15 doesn't show that the company, IONpath, induced anyone to  
16 breach a contract. At best, two people that have some role  
17 with IONpath, but are not the company itself, had in their  
18 academic life took actions that are alleged to breach a  
19 contract.

20           That's not inducement, and it's not inducement of a breach  
21 by someone other than IONpath, which is what's required.

22           **THE COURT:** What does the -- show me where the  
23 Complaint is. I'm sorry, the claim for relief that goes to --

24           **MS. MEHTA:** Paragraphs 90 through 96 is the  
25 intentional interference count.

1           **THE COURT:** 90 through 96, intentional interference  
2 with contractual relations. We allege Fluidigm requires its  
3 customers -- is IONpath a customer?

4           **MS. MEHTA:** Of Fluidigm's?

5           **THE COURT:** Yeah.

6           **MS. MEHTA:** No, not that I'm aware of. And there is  
7 certainly no allegation of that.

8           **THE COURT:** Well, let me ask plaintiff: Does the  
9 Complaint specify any customer who has breached a contract and  
10 not -- let's say, other than the possibility of those two  
11 professors, does the Complaint identify any other customer who  
12 has breached the Ts and Cs?

13           **MR. MARSHALL:** Other than those two professors at  
14 Stanford University, there is not a specific allegation that  
15 other customers breached. But there is an allegation that a  
16 class of customers were induced to breach, and did breach.

17           And I think I'm actually being held to the wrong standard  
18 here, Your Honor. If I could point you to the case law on this  
19 issue, and specifically your decision on the *Swingless Golf*  
20 case, that that opinion says (reading):

21           "Although the Complaint does not point to any single  
22 contract, it does allege a specific class of existing  
23 contracts that defendants purportedly induced the breach  
24 thereof, those existing between plaintiff and its  
25 customers for the Swingless Golf Club."

1 This pleading --

2 THE COURT: That's bringing back a fond memory, that  
3 case.

4 MR. MARSHALL: Yeah, this pleading survives a motion  
5 to dismiss. That's what that opinion says. And so --

6 THE COURT: What do you say to that, that they have  
7 alleged a class of contracts and that's good enough?

8 MS. MEHTA: Yes, Your Honor. The answer to that is  
9 twofold: One is, unlike in *Swingless Golf Clubs*, where there  
10 was a specific and ascertainable class of contracts, the  
11 allegation here is the terms and conditions which apply to any  
12 of their customers. It could be dozens or hundreds of  
13 customers. I don't know how many customers they have. So  
14 there is no way for us to know what customers they are claiming  
15 we induced to breach a contract.

16 And more importantly, if you read paragraphs 90 through 96  
17 carefully, which I know the Court has, there is no allegation  
18 that there has actually been a breach. There is lot of  
19 suggestions of encouraging breaches, but no suggestion that any  
20 customers actually breached the contract.

21 And that's the problem.

22 THE COURT: All right. That seems correct. Isn't it?

23 MR. MARSHALL: Your Honor, the class of contracts is  
24 specifically referred to in paragraph 69. It's not just any  
25 sales --

1           **THE COURT:** But you don't allege that even a single  
2 one has ever been breached.

3           **MR. MARSHALL:** We do, Your Honor. We allege in  
4 paragraph 73 that --

5           **THE COURT:** Yeah, but that's the professors. I'm  
6 talking about, other than the professors, you don't identify  
7 anybody who has ever breached.

8           **MR. MARSHALL:** This is the -- this is the classic  
9 problem where you -- we don't know all of the people who have  
10 the MIBIScope, who have their instrument, that are now buying  
11 our reagents and using them with their instrument in breach of  
12 our terms and conditions.

13           So we would need that information in discovery. We can't  
14 be held to a pleading standard based on information that's not  
15 available to us in --

16           **THE COURT:** I usually agree, but I'm sympathetic to  
17 that argument. How are they supposed to know which customers  
18 have breached until they get into your files? Bone-crushing  
19 discovery. They get into your files and they find out  
20 everybody who has bought your product. Then they go out and  
21 interview them and say, "Are you cheating on your Ts and Cs?"

22           Then somebody rolls over and says, yes, I'm sorry. I have  
23 been cheating. So then they can allege it, but they can't yet.

24           **MS. MEHTA:** No, Your Honor. My response to that is,  
25 that's precisely the kind of fishing expedition that --

1           **THE COURT:** It's not fishing. That's the way  
2 discovery works.

3           **MS. MEHTA:** No, Your Honor. The pleading standards  
4 require them to set forth a plausible inference based on facts  
5 that they have available to them that somebody has breached an  
6 agreement.

7           They know who their customers are. They know who they  
8 have Ts and Cs with. They have sales teams that go out and  
9 talk to customers on a regular basis.

10          If they have some basis to believe that any customer has  
11 breached an agreement, these are their contracts and their  
12 customers, then they can plead the facts, and then they can  
13 take discovery on whether we induced it.

14          **THE COURT:** Here is the way your argument leads to  
15 this scenario: A company in your line of business could  
16 announce to the world, or the sponsors, you go get somebody at  
17 Stanford to do it for you, you say, look, this IONpath thing is  
18 great. You can use their fluids with it. Now, be careful not  
19 to tell anybody. Be careful. Do this on the sly. But they  
20 can never sue us because as long as they don't know you're  
21 doing it, then they can't allege it, and they will never get  
22 discovery because we've got this ironclad argument that will  
23 knock the case out at the threshold.

24          **MS. MEHTA:** It sounds like a great novel, Your Honor,  
25 but there is no evidence that anything like that has ever



1 happened in real life.

2 These are two companies that operate in the same space, or  
3 very overlapping spaces. These people all talk to each other.  
4 There it is allegations in the Complaint about how our people  
5 consulted with them.

6 If they had some whiff that someone on our side was  
7 inducing customers to breach their terms and contracts, and was  
8 then telling people to cover it up, I guarantee you would have  
9 seen it in the pleadings or you would have seen it in the  
10 motion.

11 **THE COURT:** But isn't it enough -- why wouldn't it be  
12 enough just that they wrote the article?

13 **MS. MEHTA:** It's not enough --

14 **THE COURT:** Encouraging it, you can infer from that  
15 that that was their intent and --

16 **MS. MEHTA:** Because that's not a cause of action. A  
17 cause of action of, "You wrote on article in which someone  
18 might then interpret that as, 'I have free clearance to breach  
19 an agreement,'" is not intentional interference with breach of  
20 contract. The law requires there be a breach of a contract.

21 **THE COURT:** All right. I don't know the answer to  
22 this.

23 At the very outset, you said you had three points. I'm  
24 going to let you make one more point on a completely different  
25 issue here, and then I have got to move to the next case.

1           **MS. MEHTA:** Yes, Your Honor. The point on the second  
2 issue is with respect to the indirect infringement and  
3 willfulness claims. There, there is a fundamental defect with  
4 respect to both of those sets of claims, which is that there  
5 is -- for two of the three patents, there is an admission from  
6 Fluidigm that there was no pre-suit knowledge of those two  
7 patents.

8           For all three patents, there is no allegation that there  
9 was any knowledge of infringement prior to filing the  
10 Complaint. Without knowledge of the patents to three -- or  
11 without knowledge of infringement of any of the three patents,  
12 there is simply no basis to allege indirect infringement or  
13 willful infringement.

14           **THE COURT:** Okay. What do you say to that?

15           **MR. MARSHALL:** So, Your Honor, we specifically sent  
16 them notice of one of the three patents. That's the '104  
17 patent. And we specifically alleged in paragraph 36 notice of  
18 the '386 patent.

19           The third patent -- we filed our original Complaint. The  
20 third patent issues. And then a couple of days later, we filed  
21 our First Amended Complaint to add that patent.

22           And what I would say to that -- for that one, of which it  
23 would be -- I think they were tracking the issue into the  
24 patent, but for that one, it would be hard to say that they had  
25 knowledge of the patent, you know, any earlier than when it

1 issued, even when we filed our first Amended Complaint right  
2 after.

3 There is good case law saying that post-suit activity,  
4 which we have here, because they officially commercially  
5 launched after we filed our First Amended Complaint, and that's  
6 described in the papers, that that is -- that that can  
7 constitute inducement that -- the knowledge of the patent from  
8 the Complaint. And then continuing, in fact, increasing the  
9 infringing activity thereafter, the inducement thereafter, that  
10 that knowledge as of the date of the Complaint is sufficient to  
11 state a claim for post-suit inducement.

12 So for that third patent, that's the argument that I would  
13 rely on.

14 For the other two patents, we specifically allege  
15 knowledge. And they do not dispute that they had knowledge of  
16 the '104 patent. They got the correspondence. They  
17 acknowledged it.

18 They do dispute that they had knowledge of the second  
19 patent, the '386 patent. But, of course, we're not here to  
20 resolve factual disputes. We're here to decide whether or not  
21 the allegations are sufficient. And we did allege knowledge of  
22 that second patent, the '386 patent.

23 **THE COURT:** All right. What do you say to the  
24 rebuttal?

25 **MS. MEHTA:** Yes, Your Honor. Let me break it down by

1 the three patents. I think that will be more clear.

2 For the '386 patent, the allegation of knowledge is based  
3 on knowledge of other patents in the same patent family. There  
4 is no allegation of knowledge of the '386 patent, or even the  
5 application that led to the '386 patent itself. Knowledge of  
6 one patent in a family is not knowledge of the other patents in  
7 a family, which are presumed to have different scope.

8 **THE COURT:** That even came out later.

9 **MS. MEHTA:** It came out later. Many years later.

10 **THE COURT:** How can you have -- you can't be a mind  
11 reader and look into the future.

12 **MS. MEHTA:** Precisely.

13 **THE COURT:** Uh-huh.

14 **MS. MEHTA:** And there was a suggestion from  
15 Mr. Marshall that there was some sort of monitoring activity.  
16 There is no allegation of that.

17 **THE COURT:** Well, even if there was monitoring  
18 activity, how can you be -- know about a patent until it  
19 issues?

20 **MS. MEHTA:** You --

21 **THE COURT:** Or when did it issue, in terms of when  
22 this lawsuit started?

23 **MS. MEHTA:** I let me check on the '386 patent, Your  
24 Honor. I have to pull that up to tell you when it issued.

25 That issued on January 15th, 2019. So about nine or ten

1 months before the lawsuit was filed.

2           **THE COURT:** Well, then, you did have pre-suit  
3 knowledge.

4           **MS. MEHTA:** No, Your Honor. Because we didn't know  
5 about -- there is no allegation that we knew about the patent  
6 until the Complaint was filed. So there is no pre-suit --

7           **THE COURT:** I see.

8           **MS. MEHTA:** -- knowledge allegation.

9           **THE COURT:** So what is the law on whether or not you  
10 knew about the family, that's good enough?

11           **MS. MEHTA:** Your Honor, the law on that is, it is not  
12 good enough. Because each claim or each set of patents is  
13 presumed to have a different scope. And so you can't infer  
14 from one -- from the fact that you know about one patent in the  
15 family that the party knows about other patents in the family,  
16 especially here.

17           **THE COURT:** Okay.

18           **MS. MEHTA:** With respect to the '104 patent, which is  
19 the --

20           **THE COURT:** I saw the -- "patent pending" means  
21 nothing. "Patent pending" is just a gimmick that people put on  
22 there, but it means nothing. It has no legal effect.

23           **MS. MEHTA:** I believe that's true, Your Honor.

24           **THE COURT:** All right.

25           **MS. MEHTA:** I don't know. I have never litigated

1 that.

2 **THE COURT:** All right. Go ahead.

3 **MS. MEHTA:** With respect to the '104 patent, which is  
4 the patent that they claim they provided us pre-suit notice of,  
5 it is correct that they sent us a letter, and in that letter,  
6 in one sentence, they said, we want to advise you of the  
7 issuance of the '104 patent.

8 However, and this is the patent where I said we had  
9 knowledge of the patent, but no knowledge of infringement, no  
10 allegation of infringement, no identification of any product or  
11 technology that was alleged to infringe, no identification of  
12 any claim.

13 **THE COURT:** Well, what does the law say? Does the law  
14 say the letter has to say all those things?

15 **MS. MEHTA:** It doesn't require that, per se,  
16 Your Honor. Obviously, that's a factual question.

17 But here, there is no allegation that there was any  
18 knowledge of infringement. And certainly, I think more cases  
19 find that if you don't identify the claim, the product, or  
20 anything, simply putting someone on notice of a patent is  
21 knowledge of the patent but not enough to make out a case for  
22 knowledge of infringement, which is required for intent for  
23 indirect infringement.

24 **THE COURT:** In other words, let's say that I'm -- let  
25 me rephrase your point in my way.

1       So I'm there, busy engineer working away, and along with  
2       42,008 bills that come in and a lot of other things, in comes a  
3       letter from a lawyer saying -- and it says, "We want to put you  
4       on notice of the '123 patent." End of story. Signed.

5       So I say, "Well, okay. I guess I now know about the '123  
6       patent, but I'm so go glad they didn't say that we infringed  
7       it. So I can throw this one away." I throw it away. Because  
8       they didn't accuse me of infringement. That's your point.

9       **MS. MEHTA:** I would put it little bit differently,  
10      because I would like to think that someone wouldn't be quite so  
11      cavalier. But it is true, Your Honor, that the law has to  
12      create some sort of requirement for what it is that gets you to  
13      the point of a claim for willful infringement.

14      And certainly, in a situation in which someone has put you  
15      merely on notice of the patent, but not explained how that is  
16      relevant in any way to your products, what claims are alleged  
17      to be infringed --

18      **THE COURT:** Were there some prior letters or something  
19      that did point all that out?

20      **MS. MEHTA:** No, Your Honor. All the letters between  
21      the parties predating the lawsuit were about this alleged  
22      breach -- the alleged interference with contract issue, and  
23      then there was one paragraph at the end of one letter that  
24      said, "By the way, we have a '104 patent." No claims, no  
25      products, no further discussion of that.

1           **THE COURT:** Well, but if all the other discussion had  
2 been about the IONpath product in question, then maybe that was  
3 good enough.

4           **MS. MEHTA:** Well, but, Your Honor, it was not about  
5 the product. There was no suggestion as to any -- how any  
6 claim limitation would be relevant to the product.

7           It was about the question of using the Fluidigm reagents  
8 on the IONpath instrument. That's what the correspondence was  
9 about.

10          It didn't point to any suggestion of how it is that they  
11 would claim that this newly-issued patent is relevant to the  
12 technology of IONpath, what product, what claims, et cetera.

13          **THE COURT:** Are both of these companies still in  
14 business?

15          **MS. MEHTA:** Yes, Your Honor.

16          **THE COURT:** All right. What do you say to the  
17 argument?

18          **MR. MARSHALL:** I think that's the -- sort of the key  
19 question, Your Honor. This is a competitor case. There aren't  
20 many companies that actually do mass cytometry. It's a very  
21 cutting edge new technology.

22          IONpath, which is less established in the starting up,  
23 gets a letter from Fluidigm, which is the company that really  
24 pioneered this technology, saying, "Not only are you  
25 interfering with our customer contracts, but you should take a



1 look at this patent."

2 IONpath, at that point, is really only developing the  
3 MIBIScope, the instrument which we allege to be infringing. It  
4 doesn't take a rocket scientist to put those two things  
5 together. You're in this kind of space.

6 So, you know, there was a specific discussion of the  
7 MIBIScope. It's really -- that is IONPath's -- the product  
8 that they had in beta, that they have now commercially launched  
9 that that is their product.

10 So, you know, did we have to connect all of the dots in  
11 the letter to put them on notice that there was an infringement  
12 concern?

13 No, Your Honor, I don't think so.

14 And we do specifically allege in the Complaint, and it's  
15 really throughout, but paragraph 141 is just one example that  
16 this was -- that IONpath knowingly and actively aided and  
17 abetted the direct infringement of the '104 patent.

18 **THE COURT:** Do you have a client representative here  
19 today, too?

20 **MR. MARSHALL:** I do not, Your Honor.

21 **THE COURT:** Okay. Well, I'm just -- I want to tell  
22 you, I'm bringing it to an end, but this problem of why people  
23 don't put enough into their notice letters, I'm going to give  
24 you my speech on this, and then we're going to bring it to an  
25 end. And your client representative is here, so maybe they can

1 take this back.

2 So many times, I'm going to say at least 12 times over the  
3 last five years, we have arguments just like this over somebody  
4 got a letter, but the letter was vague.

5 And then, of course, I'm thinking, well, so much of this  
6 could have been avoided if they had just put in one or two more  
7 sentences. Then it would have been much clearer. So why  
8 didn't they do that?

9 Now -- and so the point is, you know, next time, maybe  
10 they should do it.

11 However, there is a reason. And it's -- it's intentional,  
12 and it's strategic. Because if you put in a sentence that  
13 says, "your product infringes," that under federal circuit law,  
14 that would be enough for, in this case, IONpath, to go into  
15 court and seek declaratory relief, and perhaps plant the flag  
16 of venue somewhere that the patent owner doesn't like, like --  
17 I don't know where, just wherever they don't like. And to  
18 start the litigation. So the federal circuit has a law that is  
19 on what exactly has to be in those letters in order to support  
20 declaratory relief.

21 So the person on the Fluidigm side, knowing what the  
22 federal circuit law is, stops short. They could have easily  
23 put that extra sentence in there, but then say, oh, no, take  
24 that out.

25 In fact, maybe one of you two lawyers lined through that

1 very sentence in a draft, said, don't put that in there. That  
2 will bring a declaratory relief lawsuit.

3 So that is the reason this is -- this minuet of the  
4 letters is guided, in part, by the federal circuit law on what  
5 has to be in there in order to support declaratory relief.

6 So then what that means is, the Fluidigm -- person in the  
7 Fluidigm situation always has to stop short and then send their  
8 lawyer, like you are, in -- send their lawyer in and say,  
9 "Well, anybody who read that letter would have known we were  
10 claiming it was infringement."

11 I just want you -- I don't want you to even respond. I  
12 just want you to know I have seen enough of these patent cases  
13 to see through this gimmick. All right. It is a gimmick.  
14 It's a gimmick to avoid declaratory relief.

15 **MS. MEHTA:** Your Honor, may I --

16 **THE COURT:** No, I don't want to hear anything more.

17 I'll let you say one more word, and then I'm going to  
18 bring it to a close.

19 **MS. MEHTA:** One more word is, setting aside all of the  
20 debate about whether the letter was sufficient, or all of that,  
21 the fundamental point, and the problem with the willfulness  
22 allegation, is that they are relying solely on the continuation  
23 of conduct after the lawsuit was filed, which the law is mixed  
24 across districts. But in this district, the case law finds --  
25 *Finjan versus Cisco* is an example --

1           **THE COURT:** There is no such thing as a law by  
2 district.

3           **MS. MEHTA:** It -- I would say the weight of the  
4 authority in this district is that the continuation of conduct  
5 merely after the filing of a lawsuit does not rise to the kind  
6 of egregious conduct tantamount to that of a pirate, that is  
7 required for willful infringement.

8           Even if you were to accept all their allegations about  
9 notice, which we don't agree with, merely continuing to sell  
10 our product after we were sued is not sufficient for a finding  
11 of willfulness, and a willfulness claim should be dismissed on  
12 that independent basis.

13           **MR. MARSHALL:** Your Honor, may I respond to that very  
14 briefly?

15           **THE COURT:** Yes, yes.

16           **MR. MARSHALL:** There is a mix of authority on that.  
17 We disagree with her position on that. But even if one were to  
18 say that the continuation of activity post-suit could not  
19 constitute willfulness, what we have here is something  
20 different, where they actually commercially launched their  
21 product post-suit. So this was not continuation of prior  
22 activity. This was a ratcheting up of activity.

23           In our opposition, we said that if you had any concerns  
24 about this issue, that we're prepared to amend. I included a  
25 declaration with exhibits showing the post-suit activity that

1 would support a motion to amend on this point. And we're  
2 prepared to do that, if you have any concerns.

3 I don't think it's necessary.

4 **THE COURT:** All right. I have a different point.  
5 When is the case management conference?

6 **MR. MARSHALL:** It's today, Your Honor.

7 **THE COURT:** Today. All right.

8 Now, this would be a perfect case for my showdown  
9 procedure. Let me explain how that works.

10 You pick your best -- you pick one claim in your patent.  
11 We will, by the end of the summer, have it completely done,  
12 summary judgment at trial, it will all be done.

13 If you win, there will be an injunction against that  
14 product. But you only get one claim.

15 At the same time, the defendant gets to pick one claim  
16 that is bogus -- because plaintiffs always assert bogus  
17 claims -- and we'll have a trial on those two claims. Or maybe  
18 a summary -- half the time, I can resolve it on summary  
19 judgment. Half the time, I have to have a trial. But it will  
20 be over by August 31.

21 And either that product is going to be off the market,  
22 because of the one that you picked, your best one, or maybe you  
23 get hit with exceptional fees. Because if it turns out, as it  
24 does in a lot of these patent cases, that the plaintiff is way  
25 off -- way off base, then you and your firm are going to pay a

1 lot of their fees for bringing this lawsuit.

2 This is called my show down procedure. That's what we're  
3 going to do in this case.

4 **MS. MEHTA:** Your Honor, may I be heard?

5 **THE COURT:** No. No. I'm not finished.

6 **MS. MEHTA:** Oh, I'm sorry.

7 **THE COURT:** This will cut through the BS. It will get  
8 right to the heart of it. And you won't have to worry about  
9 it.

10 If you're so innocent, why don't you want to have this?  
11 Some of this is going to survive. It's not going to be that  
12 you can knock this case out on a motion to -- you might knock  
13 out some of the claims. They are saying your product  
14 infringes.

15 All right. Now, what's wrong with my procedure?

16 You go first. You're the plaintiff.

17 **MR. MARSHALL:** Well, Your Honor, to be honest, I think  
18 I would want to discuss that with my client before I agree  
19 to --

20 **THE COURT:** Well, no, you don't get to discuss it.  
21 All right? If you don't have an opinion -- you should have  
22 come prepared. You know that I have this procedure. You  
23 should have already discussed it.

24 What's your view?

25 **MS. MEHTA:** Yes, Your Honor. We proposed something

1 very similar to that, but with one modification we would ask  
2 the Court to consider.

3 **THE COURT:** What's that?

4 **MS. MEHTA:** Our proposal was that we actually have an  
5 early summary judgment process on all three patents.

6 **THE COURT:** No, no, no, no. See, you're -- now,  
7 you're trying to make me do so much work that I can't do it. I  
8 can't -- you know how many other patent cases I got?

9 **MS. MEHTA:** I know, Your Honor.

10 **THE COURT:** How many other cases I've got?

11 **MS. MEHTA:** Could I --

12 **THE COURT:** They are important to those people, too.  
13 And now you want me to triple the amount of work that I have  
14 got to do?

15 They can pick one of these -- if one of these is valid and  
16 infringed, your product is going to go out the door. It's  
17 going to go off the shelf.

18 **MS. MEHTA:** Could I make my pitch?

19 Understanding --

20 **THE COURT:** No. I'm not going to do three patents on  
21 a hurry-up basis.

22 I will do one. In fact, just one claim.

23 **MS. MEHTA:** Our -- I completely understand, Your  
24 Honor, and I understand how busy Your Honor is.

25 Our request was that you consider, on these three patents,

1 one issue per patent. And actually, for two of the patents,  
2 it's the same non-infringement argument. So it would be two  
3 non-infringement arguments across the three patents, which we  
4 think will dispose of the case with respect to --

5 **THE COURT:** No. You'll pick weakest ones.

6 But he is going to pick their strongest.

7 **MS. MEHTA:** But these are in the --

8 **THE COURT:** You want to litigate their weakest party.

9 He's going to pick the one that's going to knock your  
10 product off the shelf.

11 **MS. MEHTA:** But, Your Honor, these are claim  
12 requirements that are in the independent claims. So if we win  
13 on these two non-infringement positions, which we are confident  
14 we will, then the case with respect to the patent claims will  
15 be over.

16 And I wouldn't ordinarily ask, except as Mr. Marshall  
17 said, my client is a startup. So the idea that we're going to  
18 have litigation and trial in June on two claims, and then  
19 potentially have to litigate other claims after that, is --

20 **THE COURT:** You've got three lawyers here. You've got  
21 three lawyers here. This is big-time money. I'm not -- you're  
22 not persuading me that you're a startup, and you get -- these  
23 people, Stanford and all that, they've got beaucoup money.

24 This is cheaper, to do it my way than, it is any way, the  
25 way you're suggesting. We're going to do my procedure, and I'm



1 going to give you a few -- I'm going to just send out the  
2 order. It's a standardized order. I'm going to give you a  
3 couple of weeks to decide which claim you want, and then we're  
4 going to do expedited discovery.

5 And then by the month of June, we'll be in the middle of  
6 summary judgment. And then by the end of August, we will  
7 have -- the jury will be sitting over there, and you two will  
8 be arguing to the jury. Then the other ones, we'll still get  
9 around eventually to the other claims in the case. That's the  
10 way we're going to do this.

11 **MR. MARSHALL:** Thank you, Your Honor.

12 **THE COURT:** All right? So we don't have to do  
13 anything more today on the case management. Thank you.

14 **MS. MEHTA:** Thank you, Your Honor.

15 (Proceedings adjourned at 9:41 a.m.)

16 ---o0o---

**CERTIFICATE OF REPORTER**

I certify that the foregoing is a correct transcript  
from the record of proceedings in the above-entitled matter.

DATE: Wednesday, February 12, 2020



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Ruth Levine Ekhaus, RDR, FCRR, CSR No. 12219  
Official Reporter, U.S. District Court